86-2043

No. 86-

IN THE

Supreme Court of the United States

October Term, 1986

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, NEW YORK TELEPHONE COMPANY and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioners,

v.

JOSEPH CAHILL,

Respondent.

PETITION ON BEHALF OF NEW YORK TELEPHONE COMPANY AND CENTRAL HUDSON GAS & ELECTRIC CORPORATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Question Presented

Petitioners are the Public Service Commission of the State of New York, and two privately-owned utility companies in New York State. The utility companies initiate rates that include charitable contributions as operating expenses, and the rates accepted by the Commission are based on operating expenses which include a portion of these contributions. Respondent, a customer of the utility companies, brought an action in the state courts seeking a declaration that the rates, insofar as they are based on charitable contributions, are invalid, on the ground that his First Amendment rights are violated in that some recipients of the contributions are institutions which expound beliefs and support causes which are repugnant to respondent's beliefs and practices. The utilities and the Commission moved to dismiss the complaint for failure to state a cause of action. The question presented is:

Whether the respondent has alleged facts constituting the state action necessary to ground a cause of action for violation of the First and Fourteenth Amendments to the Constitution of the United States?

List of Parties

The parties to the proceeding below were petitioners Public Service Commission of the State of New York, New York Telephone Company and Central Hudson Gas & Electric Corporation and respondent Joseph Cahill. In addition, Paul L. Gioia, Edward P. Larkin, Carmel C. Marr, Harold A. Jerry, Jr., Anne F. Mead and Rosemary S. Pooler, all of whom are current or former members of the Commission, were appellants below and are petitioners herein. The Commission and its current or former members are concurrently filing a separate petition for certiorari.

Rule 28.1 Listings

The parent corporation of New York Telephone Company is NYNEX Corporation. The subsidiaries of New York Telephone Company are NYNEX Service Company and Empire City Subway Company. The affiliates of New York Telephone Company are NYNEX Business Information Systems Company, NYNEX Credit Company, NYNEX Development Company, NYNEX Information Resources Company, NYNEX Material Enterprises Company, NYNEX Mobile Communications Company, NYNEX Properties Company and New England Telephone Company.

Central Hudson Gas & Electric Corporation has no parent corporation. Its subsidiaries are Central Hudson Cogeneration, Inc., Central Hudson Enterprises Corporation, CH Resources, Inc., Greene Point Development Corporation and Phoenix Development Corporation. Central Hudson Gas & Electric Corporation's affiliate is Thunder Hill Wind Power Company.

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New York Telephone Company and Central Hudson Gas & Electric Corporation petition this Court to issue a writ of certiorari to the Court of Appeals of the State of New York to review the decision and judgment in *Cahill* v. *Public Service Commission*, 69 N.Y.2d 265 (1986), *mot. for rearg. denied* — N.Y.2d — (1987).

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 69 N.Y.2d 265, — N.E.2d —, 513 N.Y.S. 2d 656 and is reprinted at App. A1-A19. The order of the Court of Appeals denying the motions for reargument and clarification is not yet reported and is reprinted at App. A20. The opinion of the Supreme Court

of the State of New York, Appellate Division, Third Department, is reported at 113 A.D.2d 603, 498 N.Y.S.2d 499 and is reprinted at App. A21-A29. The opinion of the Supreme Court of the State of New York, Special Term-Albany County, is reported at 128 Misc. 2d 510, 490 N.Y.S.2d 90 and is reprinted at App. A30-A35.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on December 19, 1986. Timely motions for reargument and clarification of that decision were made, and were denied by order issued and entered on March 24, 1987. This Court has jurisdiction under 28 U.S.C. Section 1257 (3).

Constitutional and Statutory Provisions and Regulatory Decisions Involved

The pertinent constitutional and statutory provisions and excerpts from relevant decisions of the Public Service Commission of the State of New York are reprinted at App. A36-47.

Statement of the Case

New York Telephone Company ("New York Telephone") is a privately-owned corporation which provides telephone and other communication services to over 6,000,000 customers throughout New York State. Central Hudson Gas & Electric Corporation ("Central Hudson") is a privately-owned corporation which provides electric and gas service to approximately 230,000 customers in the mid-Hudson River region of New York State. Like other private

corporations, petitioner utilities charge prices which are intended to defray the normal costs of running a business in today's society, including the costs of contributions to charities.[1]

With the enactment of the New York Public Service Law in the early 1900's a system of regulatory oversight became applicable to petitioner utilities. Under that statute, petitioner Public Service Commission of the State of New York ("Commission") is given the responsibility to review rate changes that are filed by a utility (*see* Public Service Law Section 66(12), 92(2) (McKinney 1955 and 1987 Supplement)). Following its review (accompanied by such hearings as are provided for by the Public Service Law), the Commission may accept the rates, it may disapprove them (and allow the corporation to file revised rates), or it may do nothing in which event the filed rates become effective (*see* Public Service Law Section 66(12), 72, 92(2) and 97 (McKinney 1955 and 1987 Supplement)).

In 1983, New York Telephone filed tariffs with the Commission which set out revisions to its rates and charges. The rates were based on the corporation's intrastate cost of doing business including, insofar as relevant here, some $4.5 million for charitable contributions. In response to this rate proposal, the Commission instituted formal hearings.

On June 22, 1984, the Commission issued its decision rejecting the revised rates, but permitting New York Telephone to implement other rates at a lower level than sought by it. Insofar as charitable contributions are concerned, the Commission allowed New York Telephone to include only $2.1 million of the corporation's $4.5 million costs in cal-

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[1] No question has been raised in this case as to the propriety of corporate charitable contributions as appropriate business expenses in today's society.

culating rates. (App. A73.) The Commission's decision reflected a practice which the Commission has followed since 1970. In that year, the Commission agreed with New York Telephone's position that charitable contributions are a reasonable operating expense upon which rates can be based. (App. A45-A47.) Pursuant to the Commission's practice, the level of charitable contributions included in operating expenses since 1970 has been limited to the amount utilities gave to charities in 1969, adjusted for inflation, regardless of the higher amounts the utilities currently are giving to charities. The Commission's 1984 decision in the New York Telephone case reflected this rate limitation.

The Commission's practice regarding utility charitable contributions was described, as follows, in the affidavit of its Counsel in support of its motion filed in the trial court to dismiss respondent Cahill's petition:

> New York State utilities have made charitable contributions for many years. Charitable contributions are considered a legitimate cost of doing business and, therefore, constitute a proper ratemaking expense. (App. A55.)
>
> The Commission . . . has never *ordered* utilities to make charitable contributions generally or religious contributions specifically. While it has allowed charitable contribution expenses to be included in estimates of utility expenses, the Commission has never interfered with the utilities' selection of donees. (App. A55-A56, emphasis in original.)
>
> The Commission . . . does not intrude upon the utilities' discretion in making contributions. The utilities select which organizations shall receive contributions and the amount of each contribution. The utilities may choose to make no contributions or contributions in excess of the amount allowed in rates. (App. A56.)

On October 19, 1984, Joseph Cahill, a customer of New York Telephone, filed a petition in the Supreme Court of the State of New York, Albany County, commencing a proceeding against the Commission to have the Commission's 1984 determination invalidated on the grounds that it violated his rights under the First Amendment of the United States Constitution. (App. A48-A52.) New York Telephone was added as a necessary party. Central Hudson was allowed to intervene because Mr. Cahill is a customer of Central Hudson, and Central Hudson's rates for electric and gas service are also calculated on a cost of service which includes a portion of Central Hudson's charitable contributions in operating expenses.

The Commission, New York Telephone and Central Hudson moved to dismiss the petition on the grounds that it failed to allege sufficient state action to support a cause of action under the First Amendment of the United States Constitution as applied through the Fourteenth Amendment. (App. A54-A82.) The Supreme Court of the State of New York, Special Term—Albany County, found that Mr. Cahill's petition alleged sufficient state action to sustain a challenge under the First Amendment and denied the motions to dismiss.

The Commission, New York Telephone and Central Hudson appealed the lower court's denial of their motions to dismiss to the Appellate Division, Third Department. In a 3 to 2 decision, the Appellate Division sustained the lower court.

Leave to appeal to the Court of Appeals of the State of New York was granted. By opinion dated December 19, 1986, a majority of the Court of Appeals sustained the denial of the motions to dismiss. The majority of the Court of Appeals held that the exercise of the Commission's

ratesetting authority combined with the state's grant of a monopoly franchise to the utility constituted sufficient state action to support an action under the First Amendment. Judge Hancock, writing for the majority in the Court of Appeals, found that the level of involvement necessary to find state action "results from the fact that the State establishes the rate that the customer must pay and the rate includes an allowance for the objected to contributions. Because the utility is a monopoly the customer must pay or be deprived of his right to utility service." (App. A6.) Judge Titone, dissenting (joined by Chief Judge Wachtler), concluded that respondent had not demonstrated a nexus between the state and the private action sufficient to support a finding of state action. Judge Titone stated that the majority's position that the state's ratesetting authority combined with the grant of a monopoly franchise constituted sufficient state action had been rejected by this Court in *Jackson* v. *Metropolitan Edison, infra.* He concluded: "if the regulatory powers of the State were not involved in the rate-setting process, utility companies, like most unregulated business concerns, would simply include in the price for their services the cost of whatever charitable donations they may choose to make. By allowing these utilities to engage, to a limited extent, in a business practice that they would naturally have pursued if there had been no State involvement at all, the PSC has done no more than merely refuse to interfere with what is essentially a private decision." (App. A16-A17, footnotes deleted.)

The Commission, New York Telephone and Central Hudson filed motions for reargument or modification of the Court of Appeal's decision which were denied by order issued and entered on March 24, 1987. (App. A20.)

Reasons for Granting the Writ

From our statement of the case it is apparent that the inclusion of charitable contributions in the cost of service was initiated by petitioner New York Telephone Company, that the Commission accepted the rates of New York Telephone, subject to limitations in amount, and that this acceptance left New York Telephone free to determine for itself whether or not to continue such contributions, to what institutions they would be made, and in what quantity they would be distributed. On the basis of these undisputed facts we think it clear that, under the decisions of this Court, respondent Cahill has not made out a case of state action. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Blum* v. *Yaretsky*, 457 U.S. 991 (1982); *Flagg Brothers* v. *Brooks*, 436 U.S. 149 (1978). We will discuss this issue more fully, but we will first establish the other reasons why this Court should grant the petition for certiorari.

1. *The New York Court of Appeals, by finding that the alleged facts comprised the state action necessary to ground a cause of action under the Fourteenth Amendment, has established federal constitutional law in New York State which is in conflict with the applicable federal law as declared by this Court and which expands the scope of the state action doctrine.* Until the decision in this case, the New York State law on state action was in harmony with this Court's decisions, such as the *Jackson* and *Blum* cases. *Montalvo* v. *Consolidated Edison Co.*, 92 A.D.2d 389, 394 (1st Dept. 1983) ("The mere fact that a State permits an action while not compelling it, is insufficient . . . to convert otherwise private action into State action," citing the *Jackson* and *Flagg Bros.* cases), *aff'd on the opinion below*, 61 N.Y.2d 810 (1984); see also *Taylor* v. *Consolidated Edison*

Co., 552 F.2d 39 (2d Cir. 1977), *cert. denied*, 434 U.S. 845 (1977); *Karp* v. *Consolidated Edison Co.*, Sup. Ct. N.Y. County (1984). (App. A64-A68.)

But in the present case the New York court rejected the authority of *Jackson* and relied instead on *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977). The New York court explained (App. A4-A6):

> The critical issue is whether petitioner's CPLR article 78 proceeding involves private conduct of a utility in which the state has merely acquiesced . . . or governmental conduct of an agency of the State itself. Because it involves the latter we hold that under the governing authority of *Abood* . . . the petition states a cognizable claim that the 1970 policy decision and the 1984 rate order of the PSC violate petitioner's rights under the First and Fourteenth Amendments of the United States Constitution. . .
>
> * * * *
>
> There is no basis for distinguishing *Abood*. The acts giving rise to the claims here and in *Abood* were not the private decisions . . . to make charitable and political contributions but the governmental actions in compelling the utility customers here and the nonunion teachers in *Abood* to pay for them.

This reliance on *Abood* was, of course, misplaced for there was *no* state action issue in *Abood*. In that case, the defendant Detroit Board of Education, a governmental entity, entered into an "agency shop" agreement with a union of its employees as permitted by a state statute. The plaintiffs were nonunion Board employees who objected to the union's use of their service fees which they were required to pay to the union under the agency shop agreement. As the Court repeatedly stated, the entire matter was in the governmental sector; there was no occasion to discuss state action, since it was obviously present on all sides.

The opinion and decision of the New York court, based as it is on this erroneous use of the *Abood* case, is binding federal law in the lower courts of New York State.[2] The situation is much the worse, however, because of the basis upon which the New York court rejected the authority of the *Jackson* case, relied on by the dissenting judges. The majority opinion first attacks the dissenters for overlooking "the utility's distinguishing characteristic as a legalized monopoly" subject to "public control," and for indulging "the fallacy of comparing a public utility with a private company because of the utility's unique public character . . . " (App. A7). True it is that "public utilities" are far more "public" than unregulated enterprises. But this very argument was urged in the *Jackson* case as the ground for treating the utility's action in cutting off the plaintiff's service as "state action" for constitutional purposes, and was flatly rejected; regulated monopolies the utilities may be,[3] but they remain private corporations, and their actions are not in themselves state action. 419 U.S. 350-51, 358-59.

Furthermore, the New York court distinguished the *Jackson* case on the ground that there "the suit was against the utility and not the Pennsylvania Utility Commission" (App. A8). It is hard to take this point seriously; surely the issue turns on the degree and type of Commission involvement in the utility company's actions, not on the entity that the plaintiff selects as its litigation target.[4]

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[2] Presumably the federal courts in New York State will continue to apply the federal law in accordance with this Court's decisions. *Taylor* v. *Consolidated Edison Co., supra.*

[3] It should be noted that others have been permitted to compete in what were formerly monopoly markets; however, for purposes of this appeal, petitioner utilities do not contest the characterization of regulated utilities as monopolies.

[4] This point was crisply made by the dissenting judges in the New York court (App. A12 fn 2).

The New York court also distinguished *Jackson* on the ground that it dealt "solely [with] the private act of the utility" (App. A8). Contrary to the New York court's reading, more than the "private act" of a utility was at issue in *Jackson;* the question there, as here, was whether approval of a tariff provision of a heavily regulated utility constitutes state action.

The reasons relied on by the New York court, as well as the decision, will be looked to by the lower New York courts in future cases. The fact that public utilities are regulated and in many respects monopolies, and the circumstance that an aggrieved plaintiff sues a state entity rather than the immediate offender, may now be used to expand the applicable scope of the Fourteenth Amendment in New York State. To embrace such an approach to the state action concept is bound to push its limits far beyond its present borders, and constitutionalize many disputes which now are settled by other and more local means.

Some governmental involvement exists in all cases where state action is alleged. But whether the offending activity is, at its root, private or whether the State can be held responsible for the offending activity requires a careful examination of the particular facts involved, and the "essential dichotomy" between private and governmental action should be maintained. *Jackson,* 419 U.S. at 345. The decision of the New York court is likely to have impact elsewhere. Virtually all the states in this country have regulatory schemes that parallel the New York scheme. Moreover, the impact of the decision of the New York court would be felt not just in the utility sector, but in other areas subject to state regulation. If the review, consent or approval by the regulatory agency of utility-initiated action is deemed to be state action, then federal constitutional issues could be expected to erupt in courts throughout the nation. This

would be especially ironic since regulatory agencies were created for the very reason that court or legislative review of specific utility action proved to be unworkable.

The charitable contributions at issue in this case are but one of many costs that could be the subject of constitutional challenges if the actions of regulated private utilities are deemed to be actions of the government via the ratemaking process. Can rates include the cost of utility-provided health plans for employees if those health plans cover abortions? Can Christian Scientists object to rates that reflect the cost of any surgery? Can ratepayers who are Sabbath-observers claim that their First Amendment rights are infringed by rates which include payments for work done on the Sabbath? Moreover, regulation of private utilities involves the state in much more than the rate process. Utilities must obtain agency approval of activities which other businesses engage in freely (e.g., construction of facilities, issuance of corporate securities, corporate reorganization, sales of assets) all of which could generate a substantial number of lawsuits based on constitutional issues.

If, as the New York Court of Appeals has indicated, the actions of regulated businesses are deemed to be those of the government, then extra burdens which the judiciary is ill-equipped to handle will be thrust upon the courts. Whether constitutional law is to move in such a direction is certainly an issue worthy of this Court's review.

2. *The state action requirement, and the use the New York court has made of the Abood case, continue to present important questions of federal constitutional law which are dividing the judges in the state and lower federal courts.* The present case is a good example. The identical state action question raised here came before a different lower New York state court, which found state action lacking. *Karp* v. *Consolidated Edison Co., supra.* In the present case

the judges divided in both appellate courts. In a contemporaneous and very comparable case in the Eleventh Circuit, the court held that state action was lacking, relying on the *Jackson, Lugar,* and *Blum* cases—the very ones that the New York court rejected as authority in the present case. *Carlin Communication, Inc.* v. *Southern Bell Telephone,* 802 F.2d 1352 (1986).

This Court has recently granted certiorari in *Communications Workers* v. *Beck,* No. 86-637, *cert. granted* June 1, 1987, 55 L.W. 3803. This case, involving problems under the National Labor Relations Act, also embraced a First Amendment claim, which raised the state action issue. 776 F.2d 1187, *en banc* hearing 800 F.2d 1280 (4th Cir. 1986). The ten judges *en banc* were divided among two who would find state action based upon *Abood,* five who thought there was none, and three who found no reason to decide the issue. In two other cases in the labor field, the circuit courts have declined to invoke the *Abood* case to resolve state action problems. *Kolinske* v. *Lubbers,* 712 F.2d 471, 476 (D.C. Cir. 1983), and *Price* v. *International Union,* 795 F.2d 1128, 1133 (2d Cir. 1986).

A grant of certiorari in this case will not only provide obviously necessary guidance to federal and state courts as to the relevance of the *Abood* case to state action. It will also provide guidance in all instances in which the state authorizes business practices by private parties which allegedly infringe the First and Fourteenth Amendment rights of others. Such questions are bound to recur, not only in the labor and utility ratemaking fields, as such cases as *Blum* have already shown.

3. *The state action issue is separate from and independent of other issues in this case, and should be decided proximately to avoid unnecessary judicial consideration of complicated questions under the First and Fourteenth*

Amendments which the New York court's affirmative decision on state action presents. The New York court decided only that the motions to dismiss respondent's petition, for lack of state action, should be denied. If that decision stands, the case will be remanded to the Supreme Court, Albany County, for hearing on the merits of respondent's claim.

That claim is explicitly based "solely on the ground that it violates his First Amendment rights of free expression, free exercise of religion and against establishment of religion" (App. A48). It is bound to raise presently unresolved federal constitutional issues of considerable complexity.

The basis upon which the petitioner utilities have included the costs of charitable contributions in their rate initiatives is that such contributions are legitimate operating expenses. If that is established, are customers paying for services rendered to them, or are they contributing to the items of expense which support these services? [5] Under either interpretation, does the respondent have any constitutional basis for objecting to the contributions in general, or to select particular contributions as obnoxious? [6] Is the status of a utility customer such as to raise any inference that the cus-

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[5] This Court in *Bd. of Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23, 32 (1926) observed that "Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company." *Also see Pacific Gas & Electric Co.* v. *Public Utilities Comm.*, — U.S. —, 106 S.Ct. at 915 fn 1 (Marshall, J. concurring (1986)).

[6] Respondent's petition is not clear on this point. In paragraph 7 of the petition he "objects as a matter of principle to being compelled to support these charities in particular, and all charities in general. . . ." But the only damage he asserts relates to particular (though un-named) charities that offend him on "moral and religious" or "personal or political" grounds, such as hospitals at which abortions may be performed. (App. A50.)

tomer approves the utility's contribution to a particular beneficiary?

In the *Abood* case this Court found no constitutional objection to requiring the nonunion teachers to pay the union for normal union activities (for example, collective bargaining and grievances) whether the individual teachers approved or disapproved them, but upheld their objections to "ideological activities unrelated to collective bargaining." 431 U.S. at 236. Should and could a similar line be drawn if the present case should go to hearing? If so should the disapproved contributions be only those remote from "legitimate operating expenses" or eliminated for other reasons?

Surely it would be poor economy to require the courts in this case, and no doubt in others, to tangle with these awkward and perhaps intractable issues if, as we believe is plain, the lack of state action stands in the way of their jurisdiction to penetrate what the late Justice Harlan would have called "the thicket of discussion". *Baker* v. *Carr,* 369 U.S. 186, 330 (1962). Further, the prospect of such complex litigation suggests the possibility that the litigants in this case might at some stage terminate the litigation, and leave these issues unresolved or mooted, so that the state action issue, if not proximately resolved, would remain where the New York court has left it.[7] This would leave litigants in New York facing, perhaps for years, conflicting

[7] Moreover, on remand, should petitioners prevail on the merits and Mr. Cahill not appeal, the petitioners would be foreclosed from bringing the state action issue back up through the State courts. The applicable New York statute provides that a party who ultimately prevails cannot appeal a preliminary determination which may have been adverse because that party is not aggrieved by the final judgment. CPLR Section 5511 (McKinney 1978); *Parochial Bus System, Inc.* v. *Bd. of Education,* 60 N.Y.2d 539, 544-45 (1983); *see* Weinstein-Korn-Miller, *New York Civil Practice,* Volume 7, Paragraph 5511.06 (Matthew Bender 1987); *compare* CPLR Section 5501 (a)(1) (McKinney 1978).

federal law applied in state and federal courts. There is abundant authority for this Court to proceed now with the state action issue, so as to prevent such an unhelpful denouement. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963); *North Dakota Pharmacy Board* v. *Snyder's Drug Stores*, 414 U.S. 156, 159-64 (1973); *California* v. *Stewart*, 384 U.S. 436, 498 n.71 (1966); Stern, Gressman, and Shapiro, *Supreme Court Practice* 6th Ed., pp. 128-36 (1986).[8]

4. *The decision of the New York court is wholly inconsistent with the state action decisions of this Court, and should be reversed and the case ordered dismissed.* The New York court got off on the wrong foot in the very first sentence of its consideration of the state action issue (App. A4): "The critical issue is whether petitioner's CPLR article 78 proceeding involves private conduct of a utility in which the state has merely acquiesced, as respondents and the dissenters contend, or governmental conduct of the state itself." Obviously, as the Court then stated "it involves the latter," but it did not involve *only* the latter. The undeniable fact that the proceeding *included* governmental action (which the New York court at once found dispositive on the mistaken authority of *Abood*) is only the beginning of the question. The proceeding was replete with

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[8] Justice White's opinion in the *Cox* case contains a full discussion of the subject. His opinion in the *Mercantile National Bank* case contains the following (371 U.S. at 558):

> This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe it serves the policy underlying the requirement of finality . . . to determine now in what state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceeding.

action by the private utility and the "critical issue" is whether there is a sufficient nexus between the proceeding and the regulated entity's action so that what happens may be deemed action of the government.

That is the issue to which this Court directed its attention in the *Jackson* case, and in the three cases decided in 1982,[9] which were analogous insofar as in each case the state had authorized actions by private parties, and it was the private parties' acts which triggered the controversies.

In the *Jackson* case, as here, the plaintiff relied heavily on the circumstance that the private utility's action (termination of service in the event of non-payment) had been set forth in a proposed rate structure which the utility had filed with the regulatory body. The Court's comments (by then Justice Rehnquist) are germane to the present case (419 U.S. at 357):

> The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into "state action."

In the *Blum* case, patients in a nursing-home, funded and heavily regulated by the state, complained that the level of

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[9] The cases are *Blum, supra; Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, and *Rendell-Baker* v. *Kohn*, 457 U.S. 830.

their care had been down-graded by a committee of doctors appointed to monitor and to assess the patients' needs. This Court held that these decisions did not constitute state action, saying (457 U.S. at 1004-05):

> . . . although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed to be that of the State. . . . Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.

In the present case, it is plain that the Commission's approval of a portion of New York Telephone's charitable contributions as normal business expenses was acquiescence and not initiative. The rate change of New York Telephone Company in 1970 was the initiative which opened the matter before the Commission. (App. A45-A47.) Its approval of the rate change, subject to quantitative limitations, was not a mandate to New York Telephone in particular, or utilities in general, either to make contributions or to include these contributions in operating expenses upon which rates are based. Complete discretion was left to the utilities with respect to whether they should make contributions, the selection of recipients, amount of contributions, and all other such matters of choice (App. A55-A56).

The minority in the New York court was correct in stating that *Jackson* requires a state action analysis which "subtract[s] the government from the equation and then consider[s] what the behavior of the private entity would be without any governmental intervention at all." (App. A16.)

This type of analysis is intended to determine whether the actions of the private entity would have been carried out in the absence of the state or whether the state could be said to have coerced, or encouraged actions that would not otherwise have occurred. Only in the latter instance can state action be present. *Jackson*, 419 U.S. at 357; *Blum*, 457 U.S. at 1004-05; *Flagg Brothers*, 436 U.S. at 164. Here, as recognized by the minority in the New York court, in the absence of the regulatory system (App. A16):

> . . . utility companies, like most unregulated business concerns, would simply include in the price for their services the cost of whatever charitable contributions they might choose to make. . . .

The decision of the New York court can be contrasted with the Eleventh Circuit's decision in *Carlin Communication, Inc.* v. *Southern Bell Telephone*, 802 F.2d 1352 (11th Cir. 1986). In *Carlin*, the plaintiff, a business which subscribed to a service of a telephone company under which the business provides a pre-recorded message which members of the public may hear when the subscriber's number is called, claimed that a provision in the telephone company's tariff which permitted the telephone company to exclude sexually explicit messages violated the subscriber's First and Fourteenth Amendment rights to freedom of speech. The court found a lack of state action despite the fact that the state agency had issued an "order strongly approving" the tariff at issue. 802 F.2d at 1358. The Eleventh Circuit cited *Jackson* for the premise that "the mere approval by the PSC of a business practice of the regulated utility does not 'transmute a practice initiated by the utility' into state action." 802 F.2d at 1361.

The telephone company in *Carlin*, like the petitioner utilities in the present case, is a heavily regulated utility whose tariffs are subject to regulatory review and approval. The

subscriber in *Carlin*, like the respondent herein, had no practical alternative to taking service pursuant to the terms of the utility's tariff. Thus, both the subscriber in *Carlin* and respondent herein face the same coercion, *i.e.*, compliance with the terms of a utility's tariff as a condition to obtaining service. Despite these similarities, the *Carlin* court and the New York court reached different results on the state action question.

The decision of the New York court in the instant case significantly expands the basis upon which private entities can be held to constitutional standards applicable to governmental bodies. In turn, the decision also markedly widens the basis upon which the governmental bodies which deal with these private entities can be held responsible for private business decisions.[10]

The distinction between private and governmental action is of profound significance under our system of law. As this Court recently noted in *Lugar*, 457 U.S. at 936:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial powers. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

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[10] See the Solicitor General's comment at page 29 of his brief *amicus* for the United States in *Communications Workers* v. *Beck*, *supra*: "Treating Congress's decision *not* to prohibit particular conduct as a basis for finding 'governmental action' would . . . subject private actors to constitutional restraints that are not designed to restrain them at all." (Emphasis in original.)

The decision of the New York court, we submit, erroneously fails "to respect the limits" of the powers of the New York courts as directed against governmental and private interests.

Conclusion

For the reasons stated, the petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted,

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